

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES GERALD GARZA,

Plaintiff,

vs.

SHERIFF LARRY TAYLOR, BENTON
COUNTY JAIL, CPT. DANIELS,
SHERIFF KEANE, DR. COOPER,
RN BESSIE, BENTON COUNTY
HEALTH DEPARTMENT and ARNP
SUSAN POWERS BRAN,

Defendants.

NO. CV-11-5010-EFS

**ORDER DENYING MOTIONS AND
DISMISSING FIRST AMENDED
COMPLAINT**

1915(g)

Before the Court, without oral argument, are a letter received April 12, 2011, which the Court liberally construed as a Motion for Appointment of Counsel, ECF No. 16, and a document titled, "Request for Counsel," received April 26, 2011, also construed as a Motion for Appointment of Counsel, ECF No. 19. Plaintiff failed to note his motions for calendar (and he did not present memoranda in support of his motions) as required by Local Rule for the Eastern District of Washington (LR) 7.1(h). Since this is the first time Plaintiff has failed to do so, the Court noted his motions for him on the date signed below. PLAINTIFF IS CAUTIONED THAT ANY FURTHER MOTIONS SUBMITTED TO THE COURT WITHOUT NOTING THEM FOR HEARING IN COMPLIANCE WITH THE LOCAL RULES WILL NOT BE ADDRESSED BY THE COURT.

1 **APPOINTMENT OF COUNSEL**

2 Plaintiff requests the appointment of counsel. This Court has
3 discretion to designate counsel pursuant to 28 U.S.C. §1915(e)(1) only
4 under exceptional circumstances. *Terrell v. Brewer*, 935 F.2d 1015, 1017
5 (9th Cir. 1991). Determining whether exceptional circumstances exist
6 requires evaluating "the likelihood of success on the merits and
7 plaintiff's ability to articulate his claims *pro se* in light of the
8 complexity of the legal issues involved." *Id.* (citation omitted).

9 Plaintiff simply asks for assistance with further litigation. The
10 record does not reflect exceptional circumstances which warrant the
11 appointment of counsel to assist Plaintiff at this time. Therefore, **IT**
12 **IS ORDERED:** Plaintiff's Motions for appointment of counsel, ECF Nos. 16
13 & 19, are **DENIED**.

14 **FIRST AMENDED COMPLAINT**

15 On May 2, 2011, Plaintiff submitted a First Amended Complaint and
16 two Memoranda of Law in Support, ECF Nos. 20, 21, & 22. On May 3, 2011,
17 Plaintiff submitted a third Memorandum, ECF No. 23. After review of
18 Plaintiff's submissions, the Court finds the First Amended Complaint
19 fails to cure the deficiencies of the original complaint.

20 Plaintiff states on July 8, 2010, he was poked in the back and on
21 his finger by a tattoo needle hidden in a jail issued mattress. He
22 contends, contrary to policy, the mattress had not been inspected for
23 contraband. Plaintiff admits he was immediately transported to medical
24 following discovery of the needle with ink and blood on it.

25 Plaintiff complains Defendant "Nurse Bessie" initially stated she
26 could not help Plaintiff because she did not have proper training for
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1 "air-borne communicable diseases." Nevertheless, she assisted Plaintiff
2 as he swabbed an alleged puncture wound in his back with alcohol pads.
3 Plaintiff states he squeezed his finger to force blood out and applied
4 a band-aide. Plaintiff indicates Defendant Benton County Health
5 Department was contacted the next day and he was taken to the hospital
6 where he was given a test and shots for Hepatitis, HIV, and Tetanus.
7 Plaintiff states eight vials of blood were also drawn for more testing.
8 Plaintiff indicates he received further shots and blood work 30 days and
9 six months later.

10 He states the first two tests came back negative, but the six month
11 test "came back positive for HAVAB." He states he has "continued to
12 request further test and medication which 'they' refuse." Plaintiff
13 does not identify "they," or what further tests and medications had been
14 deemed medically necessary.

15 Plaintiff claims Defendant Cpt. Daniels assured him the bills for
16 hospital and lab work would be paid, but they were not paid and were
17 forwarded to a collection agency. Plaintiff states he has scars on his
18 back and finger, and the bills are incurring daily interest. He claims
19 he has acquired physical injuries as well as emotional injury. He seeks
20 monetary damages for alleged negligence.

21 Plaintiff attached the results of his blood work, as well as
22 correspondence from Defendant Captain Daniel and a Risk Manager
23 regarding the medical bills, as exhibits to his First Amended Complaint,
24 ECF No. 20, at 8-14. In a response to kites and grievances dated
25 January 28, 2011, Defendant Daniel expressly stated, "Benton County
26 intends to pay the bills related to the July 8, 2010 incident regarding
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1 you being poked by a concealed tattoo needle." ECF No. 20, at 9.

2 Defendant Daniel also notified Plaintiff on February 17, 2011, that
3 one bill from Kennewick General Hospital had been paid, and that another
4 unpaid bill had been removed from collections and would be sent to
5 Benton County, ECF No. 20, at 10. The collection notices Plaintiff
6 attached to the First Amended Complaint are from December 23, 2010, and
7 January 10, 2010 . *Id.* at 20-21. Plaintiff was clearly instructed if
8 he did receive further bills surrounding the incident to forward them to
9 the Benton County Jail. *Id.* at 9. Plaintiff's exhibits do not show a
10 refusal to pay these medical bills.

11 Test results from blood drawn on January 20, 2011, state "CURRENT
12 OR PAST HAV INFECTION. PAST HBV INFECTION OR VACCINATION. NO SEROLOGIC
13 EVIDENCE OF HCV INFECTION." This result is consistent with the medical
14 records indicating Mr. Garza received a Hepatitis B vaccine on August 9,
15 2010, ECF No. 20, at 16. Plaintiff's exhibits do not support any
16 contention he contracted Hepatitis C. Plaintiff has shown he received
17 medical care, treatment, and testing within 48 hours of his
18 injuries. He also received follow-up testing as indicated. Plaintiff
19 has failed to present facts showing identified Defendants were
20 deliberately indifferent to his serious medical needs. *Farmer v.*
21 *Brennan*, 511 U.S. 825, 837 (1994). At worst, Plaintiff alleged a
22 negligent exposure to bio-medical hazards. Negligence, however, is not
23 actionable under § 1983. *Davidson v. Cannon*, 474 U.S. 344, 347-48
24 (1986).

25 The Court finds Plaintiff's First Amended Complaint fails to state
26 a claim upon which relief may be granted in the Federal District Court.
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1 Accordingly, **IT IS ORDERED:** the First Amended Complaint, ECF No. 20, is
2 **DISMISSED** under 28 U.S.C. §§ 1915(e)(2) and 1915A(b)(1), but without
3 prejudice to seeking appropriate remedies in the Washington State
4 courts.

5 Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner
6 who brings three or more civil actions or appeals which are dismissed as
7 frivolous or for failure to state a claim will be precluded from
8 bringing any other civil action or appeal *in forma pauperis* "unless the
9 prisoner is under imminent danger of serious physical injury." 28
10 U.S.C. § 1915(g). Plaintiff is advised to read the new statutory
11 provisions under 28 U.S.C. § 1915. This dismissal of Plaintiff's
12 complaint may count as one of the three dismissals allowed by 28 U.S.C.
13 § 1915(g) and may adversely affect his ability to file future claims.

14 **IT IS SO ORDERED.** The District Court Executive is directed to
15 enter this Order, enter judgment, forward copies to Plaintiff at his
16 last known address, and close the file. The District Court Executive is
17 further directed to forward a copy of this Order to the Office of the
18 Attorney General of Washington, Criminal Justice Division. The Court
19 certifies any appeal of this dismissal would not be taken in good faith.

20 **DATED** this 18th day of May 2011.

21
22 s/Edward F. Shea
23 EDWARD F. SHEA
24 United States District Judge

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